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**THE ART OF CONFESSIONS:
A COMPARATIVE LOOK AT THE LAW
OF CONFESSIONS –
CANADA, ENGLAND, THE UNITED
STATES AND AUSTRALIA**

by

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Canada, England, the United States and Australia

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I. Introduction

1. The Context

The law of confessions reveals the complexity and conflicting interests involved in controlling crime while also respecting individual human rights. At first glance the confessions rule can be mistakenly straightforward – a confession is inadmissible if the suspect did not act voluntarily due to police coercion. However history tells us that the law of confessions is anything but straightforward. The perceived need for confessions in the criminal process for the effective prosecution of the “guilty” competes with the principle of limiting the ability of the State to compel self-incriminating evidence. Such complex interplay is reflected in the various theories which underlie the law on confession; ensuring the privilege against self-incrimination; ensuring reliability of the confession; preventing abusive interrogation practices; and protecting the right of suspects to make autonomous decisions.

This paper will explore the development and evolution of the privilege against self-incrimination and the common law voluntariness rule in four jurisdictions, Canada, England, the United States and Australia. In so doing, the various underlying theories of the law of confessions that have also evolved over time in these jurisdictions will also be examined. Looking at the history of the law of confessions, we see the age old dilemma between using police interrogation and abstracting confessions as a key method to investigating and prosecuting crimes and not improperly exploiting the individual for the information necessary to convict him or her. This dilemma is all the more starkly illustrated in the last part of this paper when examining the law of confessions in the age of terrorism.

2. Terminology

Prosecutors often want to introduce into evidence in a criminal trial the accused’s own words or gestures for the purpose of inculcating the accused at trial. As described by Professor Pattenden, the responses by the accused to police interrogations can be various, from “silence, denial, full confession, admissions, mixed statements” to “the various possible kinds of ‘innocent’ statements”.¹ For the purpose of this paper, any statement made by the accused, which the prosecutor offers into evidence will be included in a broad definition of confession.² However, a brief description of these various terms will assist the reader in understanding the complexities in this area of law.³

¹ Rosemary Pattenden “*Using the Overtly Non-Incriminating Statement to Incriminate: A Theoretical Framework*” (1999) 3 International Journal of Evidence and Proof 217.

² In some jurisdictions, a broader definition of confession is embraced to include any statement made by the accused to which the prosecutor offers into evidence. Such a statement may be full acknowledgment of guilt or an acknowledgement of an element of the offence charged. It has also included exculpatory statement in which the accused told a lie if the prosecutor adduces it as a prior inconsistent statement or to show a consciousness of guilt. Anthony Sheppard, *Evidence, Revised Edition* (1996: Carswell).

³ The remaining part of this section describing the different terms are taken from a number of sources, including Pattenden, *supra* note 1 and Sheppard, *supra* note 2 as well as David Watt, *Watt’s Manual of Criminal Evidence* (2002: Carswell).

The technical definition of “confession” is the admission to all of the elements of an offence, including the mental element. A confession is introduced by the prosecution at trial as evidence of its truth. However, an accused’s statement does not have to fall within the technical definition of a confession in order to be used against him or her at trial. “Admissions” are statements which concede at least one fact that, if true, is relevant to prove the accused’s guilt. Such statements could be made when the person is unaware of how their words can incriminate them. An “admission” falls short of a full confession. There are many reasons why a prosecutor might offer such admissions into evidence in any particular case, but generally speaking it is either to prove subsidiary facts leading to an inference of guilt or to make the accused out to be a liar.

“Exculpatory statements” are those statements made to the police that do not admit any element of the offence and can range from outright denial to alibi statements. This can also include non-incriminating statements. Prosecutors may want to introduce such statements into evidence to show that it is untrue and therefore the accused unintentionally incriminated himself or herself by the fact that he or she lied. Prosecutors may also want to admit such statements not as evidence of the truth but to impeach the accused if the accused chooses to testify on his or her own behalf. An accused’s statement could include both exculpatory statements and admissions. Whether such statements are covered by the laws of confessions varies from one jurisdiction to another, as will be explored later in this paper.

Another way the prosecutor might attempt to inculcate the accused at trial is through the accused’s silence or bare denial. The accused’s silence and refusal to answer police questions may be used by the prosecutor to “strengthen the probative force and inferences from other prosecution evidence or, conversely, weaken the probative force and inferences from defence evidence”.⁴ If the accused’s silence implies a consciousness of guilt, it could constitute evidence of guilt. This topic has been covered by a previous paper on the right to silence and therefore will not be addressed in this paper.⁵

II. A Short History on the Law of Confessions

The law of confessions has undergone an extensive and complicated history. In many of the common law jurisdictions, the confessions rule is stated simply: a confession is inadmissible if the suspect did not make a voluntary statement due to police coercion.⁶ The confessions rule deals mainly with admissibility. If the defence does not succeed in excluding the accused’s statement from evidence, the defence is still free to argue before the trier of fact that the statement should be given no weight due to its unreliability.

⁴ Pattenden, *supra* note 1.

⁵ See Eileen Skinnider and Frances Gordon, “*The Right to Silence – International Norms and Domestic Realities*” Paper presented at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants, Beijing, 15-16 October 2001.

⁶ Steven Penney “*Theories of Confession Admissibility: A Historical View*” (1998) 25 *American Journal of Criminal Law* 309 and Wolchover, D. and Heaton-Armstrong, A. *Wolchover and Heaton-Armstrong on Confession Evidence* (1996: London, Sweet Maxwell).

Many of the elements of the confessions rule were put into place decades ago by the courts.⁷ A review of the history of the law of confessions serves a number of purposes. First, it provides some insight into the various perspectives and approaches to the law of confessions in different jurisdictions. Secondly, such a review offers some appreciation as to why there has been and still is much debate and critique in this area of law. Lastly, the evolution of the law of confessions illustrates the various underlying theories that the courts use today to justify restrictions on the admissibility of confessions. This paper is limited to reviewing briefly the adversarial criminal justice system that developed in England and some of its former colonies

1. *Nemo tenetur* and the Privilege Against Self-Incrimination

The Latin phrase “*nemo tenetur prodere seipsum*”, literally meaning “no one is bound to bring forth himself”, dates back to Roman times.⁸ It appears that at that time, the principle that no person should be compelled to betray himself in public was a check on overzealous officials rather than a subjective right of anyone who was accused of a crime.

In England, it was not until the late 16th Century and early 17th Century that we see clear statements of the privilege against self-incrimination being developed. This occurred around the controversial ecclesiastic courts, the Star Chamber and the High Commission, which were highly unpopular because they had jurisdiction over religious and political dissent and their procedures were seen as oppressive.⁹ The judges had power to interrogate an accused under oath. The suspect could be punished for refusing to testify and it was said that these courts endorsed the practice of torture during interrogation. Furthermore, the interrogation often took place before charges were laid and without the person being informed of what they had alleged to have done. In 1640, a statute brought an end to the practice of interrogating defendants under oath, and the following year these courts were abolished by the Parliamentary government of Oliver Cromwell.

After the abolition of these courts, the accused was not required or even allowed to take the oath and the practice of that time did not allow the accused to be represented by a lawyer. The accused therefore had to speak for himself or herself but not under oath. Consequently, it was only when the practice of being represented by lawyers and the emergence of the law of evidence, was the privilege against self-incrimination developed as a protection of criminal defendants in the common law. It was in 1898 in England that the *Criminal Evidence Act* was adopted making the accused a competent but not compellable witness.¹⁰ This meant that the accused had the right to testify under oath but not a duty. At the time when the accused’s right to remain silent was being firmly established, no longer compelling the accused to speak at trial, a new source of self-

⁷ Christopher Sherrin writes that the confessions rule “is almost entirely the creation of the courts”. Christopher Sherrin “*False Confessions and Admissions in Canadian Law*” (2005) 9 Queen’s Law Journal 601 at 613.

⁸ The summary of the *nemo tenetur* principle is taken from Skinnider and Gordon, *supra* note 5.

⁹ *Nemo tenetur* was invoked against these courts which required the accused to swear to answer truthfully to questions prior to being made aware of the case against them. Based on medieval Christian theology two tenets (i) that the commission of a crime did not nullify an individual’s natural duty of self-preservation and (ii) that perjury was a mortal sin. For more details of the early history of *nemo tenetur* see Mark Godsey “*Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*” (2005) 93 California Law Review 465.

¹⁰ Skinnider and Gordon, *supra* note 5.

incriminating evidence was becoming increasingly available - confessions obtained by the police.¹¹

With the emergence of the modern police force, the focus of the criminal enquiry shifted from the judicial proceedings to police investigation including interrogation. Early case law expanded the privilege against self-incrimination to apply to confessions taken by the police during informal, pre-trial interrogations.¹² The doctrine of *nemo tenetur* also influenced the development of the privilege against self-incrimination in constitutional instruments. As one academic writes, it was the doctrine of *nemo tenetur* and the repulsion towards the government's use of torture and coercive interrogation techniques that ensured the privilege against self-incrimination be included in the American Bill of Rights.¹³

The evolution of the privilege against self-incrimination has relied on a number of underlying theories over the years. These include addressing concerns of reliability of the evidence, abusive inquisitorial practices, and recognizing the natural right of self-preservation.¹⁴

2. Voluntariness Test

The principle of voluntariness developed along with the establishment of the professional police force in England in 1829.¹⁵ A common law rule of evidence evolved holding that all involuntary statements are inadmissible at trial. The development of this rule of evidence has been attributed to the suspicious ways confessions were taken, and focused primarily on the issue of untrustworthiness and reliability of the statements rather than the offensive manner in which the statements were taken.¹⁶ In other words, this rule of evidence was designed to exclude unreliable evidence.

One of the leading cases that developed this doctrine was the 1783 case of *Rex v Warickshall*.¹⁷ The accused in that case made a full confession after the police made "promises of favor". The Court held such promises rendered the statement involuntary and for that reason the evidence would not be admissible. It went on to reason that such practice made the confession unreliable. While in *Warickshall*, the Court excluded the confession, it admitted the derivative evidence, the property which the authorities had recovered as a result of the confession. In justifying the admission of the property the Court stated a theory of admissibility which turned on the reliability of the evidence in question:

¹¹ Godsey, *supra* note 9.

¹² In the United States in 1897, *Bram v United States* 168 US 532 (1897) established for the first time in that country that the privilege against self-incrimination applied to confessions taken by the police during informal, pre-trial interrogations. See Godsey, *supra* note 9 at 475.

¹³ As Professor Eben Moglen has written, records from colonial America disclosed a strong array of beliefs that physical and spiritual coercion was an inappropriate way to secure evidence of crime and that such beliefs were strongly debated during the era preceding the American Revolution and the drafting of the Bill of Rights, as described in Godsey, *supra* note 9 at 480.

¹⁴ Penney, *supra* note 6.

¹⁵ According to Steven Penney, police interrogation is a thoroughly modern phenomenon. Large scale professional police forces did not exist prior to the latter half of the 19th century. For more details see Penney, *supra* note 6 at 323-324.

¹⁶ Godsey, *supra* note 9 at 481-482.

¹⁷ *Rex v Warickshall* (1783), 1 Leach 263.

“Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt... but confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape... that no credit ought to be given to it; and therefore it is rejected. This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source.”¹⁸

In the United States, the first decision to exclude an involuntary confession was *Commonwealth v Chabcock*, which involved a confession induced by the victim’s promise of favor.¹⁹ It was said that the sole purpose of the voluntariness rule was to reduce the possibility of wrongful conviction by preventing the jury from considering dubious confessions. Early cases do not link voluntariness with self-incrimination. As Penney states “it was clear from the beginning that the common law voluntariness rule applied to police activity to protect the factual integrity of confessions in the face of improper inducements or threats”.²⁰

At the beginning of the development of this common law voluntariness test, voluntariness was seen not as an end in itself but only as a means of predicting reliability. As Godsey argues the voluntariness test had very little relationship to the privilege against self-incrimination or to the policies underlying it:

“The common law cases that established the voluntariness doctrine generally do not mention *nemo tenetur*, the practices of the Star Chamber or to events leading to the adoption of the self-incrimination clause. These cases are not based on civil liberty concerns but rather concerns of reliability.”²¹

However later cases dealing with the voluntariness rule moved away from solely being concerned with reliability and introduced the concern for the individual’s autonomous decision-making. As reflected in one of the leading British treatise on evidence:

“A confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence”.²²

This expression of early English jurisprudence found its way to the United States in the *Bram* case of 1897.²³ A decision of the English courts in 1914, *Ibrahim v R*, further established that an admission of confession made by the accused to the police would only be admissible in evidence if the prosecution could establish that it had been voluntary, made in the exercise of free choice about whether to speak or remain silent.²⁴

Most of the former English colonies adopted this confessions law of voluntariness. Almost all continue to adhere to it, though subject to modification and convoluted debates. Growing concern and recognition of the general brutality of police interrogation

¹⁸ *ibid.*

¹⁹ *Commonwealth v Chabcock* is discussed in Penney, *supra* note 6 at 321.

²⁰ Penney, *supra* note 6 at 324.

²¹ Godsey, *supra* note 9, at 484.

²² This quote from Russell’s leading treatise was made in *Bram v United States*, as quoted in Godsey, *supra* note 9 at 476.

²³ *Bram v United States* 168 US 532 (1897).

²⁴ *Ibrahim v R* [1914] AC 599.

in the 1930s resulted in case law in the United States defining the sort of police conduct that would impugn the trustworthiness of a resulting confession.²⁵ In *Brown v Mississippi* the Court held that physical torture would result in excluding the confession.²⁶ Other cases showed that prolonged, unrelenting incommunicado interrogation would do the same.²⁷

There have been various ways of stating the voluntariness test. Some American cases use the phrase, “determining when the accused’s will is overborne”. This approach to voluntariness asks the question:

“Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process”.²⁸

The test of voluntariness has been considered by many commentators to be vague, contradictory and politically malleable. It has been criticized as impossible, perplexing, useless and downright misleading.²⁹ However, no matter how it is formulated or approached, trial judges are often loath to find a confession involuntary. So, such a vague test allows for wide discretion.

3. Confusion

The two distinct confession rationales, *nemo tenetur* and the common law voluntariness doctrine, were applied in confusing and convoluted ways even fairly early on. Scholars have argued that this was indeed what happened in the 1897 case of *Bram v United States* which first introduced the concept of voluntariness into constitutional confessions law in the United States, apparently confusing a common law rule of evidence with the self-incrimination clause.³⁰ With the Court reading the voluntariness rule into the *nemo tenetur* principle, the focus was shifted to whether the making of the statement was voluntary, rather than on the reliability of the statement. The question became whether the accused was involuntarily impelled to make a statement and “but for” the improper influences he or she would have remained silent. The confession may be perfectly trustworthy but may be found to be inadmissible if the statement was obtained in an inhumane or offensive manner. The concern became fixed on the accused’s freedom to decide whether to speak or not, rather than on the reliability of the statement.

Over the next one hundred years, the law of confessions has been described in a variety of ways, using various rationales and doctrines. However some argue that the foundation of any confessions law remains the test of voluntariness. But, further confusion arises when asking the question of what is meant by voluntariness? As Grano pointed out, the

²⁵ The 1931 Report of the Wickersham Commission revealed that third degree methods were widespread and were employed especially against the racial minorities and the poor. This report influences a generation of criminal justice reformers. As cited in Penney, *supra* note 6 at 335-336.

²⁶ *Brown v Mississippi* 297 US 278 (1936).

²⁷ Penney, *supra* note 6 at 336.

²⁸ *ibid* at 353.

²⁹ Godsey, *supra* note 9 at 469 and Penney *supra* note 6.

³⁰ Godsey, *supra* note 9 at 467.

“effort to distinguish voluntary from involuntary actions dates back at least to Aristotle” and it is “an enterprise fraught with difficulty”.³¹ What factors must be considered when assessing voluntariness? Should this include the obvious objective factors, such as the length of the interrogation and whether the interrogators used force of any kind or degree against the suspect, but also subjective characteristics unique to the particular suspect? As Godsey writes, “the number and variety of subjective factors that may enter into the equation are unlimited and may include the suspect’s age, race, education, certain psychological strengths or weaknesses”.³²

4. Dilemma of Modern Confessions Law

Steven Penney described the dilemma of modern confessions law succinctly:

“On one hand custodial interrogation [is] an indispensable method of criminal investigation. Once this is admitted, it becomes impossible not to grant the police “whatever reasonable means are needed to make the questioning effective” including prolonged, secret questioning and the refusal to issue warning or permit access to counsel. On the other hand, it is understood the dangers of such practices; they create the risk “that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt”.³³

According to Frankfurter, the moral imperative in the criminal justice system is that “men are not to be exploited for the information necessary to condemn them”.³⁴ Therefore the State, which has a responsibility to investigate and punish criminals in the community must “produce the evidence against him by the independent labour of its officers, not by the simple, cruel expedient of forcing it from his own lips”.³⁵ The conflict between a suspect’s self-determination interests and the state’s interest in securing confessions through police interrogation has resulted in a confused theory of confessions law in trying to mean many things for many agendas.

In a recent House of Lords opinion, the anomaly of English common law which accepts that involuntary statements are inadmissible while treating as admissible evidence the physical evidence which would never have come to light but for the involuntary statement (derivative evidence) was discussed.

“This is a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement.”³⁶

The House of Lords may not provide extensive analysis to this issue but it does acknowledge the anomaly and accept it as a pragmatic compromise.

A further problem of modern confessions law is due to the fact that many of its elements were developed decades ago, long before any “serious study” had been given to social

³¹ M.K.B. Darmer “*Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*” (2003) 12 *Cornell J. L. & Pub. Pol’y* 319 at 328.

³² Godsey, *supra* note 9 at 468.

³³ Penney, *supra* note 6 at 352.

³⁴ Justice Frankfurter was cited at length from the case of *Culombe v Connecticut* in Penney, *supra* note 6 at 352.

³⁵ *ibid* at 352.

³⁶ *Opinions of the Lords of Appeal for Judgment in the Case A (F.C.) and Others v Secretary of State for the Home Department* [2005] UKHL 71, 8 December 2005. As cited from Lord Bingham’s opinion.

science and human behaviour.³⁷ As one commentator says the reality is that “legal rules and police practice have been based on assumptions about human behaviour, which may or may not be correct” and that “judges have no special scientific knowledge of what circumstances will and will not lead to unreliable or false confessions”.³⁸ This argument challenges the assumption that if a confession is voluntarily obtained then it is presumed to be reliable. Current research on the phenomenon of false confessions study the circumstances surrounding voluntary confessions that are later found to be false.³⁹

III. Various Theories Underlying the Law on Confessions

The previous section introduced some of the different underlying theories or rationales that have been developed over different periods of history. These include: protecting the privilege against self-incrimination and the right to silence; ensuring the reliability of the confession; preventing or deterring abusive interrogation practices; and protecting the right of suspects to make autonomous decisions.

1. Privilege against Self-Incrimination

One of the theories behind the confessions rule and voluntariness test is based upon the privilege against self-incrimination which demands “every person be accorded a free choice whether to confess and no person can be forced or otherwise pressured or tricked into confessing”.⁴⁰ The European Court on Human Rights agreed with such a policy justification for excluding confessions when it held that the objective of the privilege against self-incrimination is to protect the accused’s free choice to speak or to remain silent.⁴¹ That court found that the right to a fair trial as contained in article 6 of the *European Convention on Human Rights*, implicitly provided for an absolute privilege against self-incrimination.⁴²

Pattenden writes that:

“Underpinning the privilege are several rationales: to discourage improper physical or psychological pressure, to avoid miscarriages of justice and respect for human dignity and autonomy.”⁴³

This statement shows the interrelatedness of the various rationales and reveals the convolution of the theorizing surrounding the law of confessions.

The implementation and interpretation of the privilege against self-incrimination varies from one jurisdiction to another. For example, in the United States, the Fifth Amendment ensures that “no person... shall be compelled in any criminal case to be a witness against

³⁷ Sherrin, *supra* note 7 at 613.

³⁸ For further details on the types and reasons for false confessions see Sherrin, *supra* note 7. He notes three main types of false confessions: voluntary, coerced-complaint, and coerced-internalized. He argues that judges should be made aware of the social science evidence that casts doubt on the value of some confessions, so that they can better use their discretion to exclude unreliable statements.

³⁹ Research studies of Drizin, Leo and Ofshe as well as Gudjonsson are discussed in detail in Sherrin, *supra* note 7.

⁴⁰ See A. Ligertwood, *Australian Evidence* text book from 1998 as cited in Pattenden, *supra* note 1.

⁴¹ *Saunders v UK* (1997) 2 BHRC 358 as cited in Pattenden, *supra* note 1.

⁴² *ibid.*

⁴³ Pattenden, *supra* note 1.

himself”.⁴⁴ The text of the self-incrimination clause suggests a standard based on “compulsion”, which focuses on the objective behaviour of the interrogators. As Godsey noted, such an objective test is different than the voluntariness test which focuses on the suspect’s subjective mind. This would mean that the focus is more on “compelled” confessions, not involuntary ones. Some of the American jurisprudence follows such an interpretation when they hold that involuntary confessions are inadmissible “not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured”.⁴⁵

2. Ensuring Reliability of the Confession

The rationale often put forth for the confessions law, simply stated as involuntary statements should be inadmissible, is that it is intended to weed out potentially unreliable statements. As far back as *Warickshall* in 1783, the court found that involuntary statements are inherently unreliable. Others have written about the “inherent untrustworthiness of coerced confessions”.⁴⁶

The confessions rule has been interpreted to prohibit certain conduct on the part of the authorities. This in part is because it might result in unreliable evidence. Inducements, threats and, sometimes oppressive circumstances, have all been proscribed to some extent or another in these jurisdictions because they might lead suspects to falsely incriminate themselves.⁴⁷

The converse of this traditional rule is that if confessions are voluntary, they must be reliable indications of guilt. However, as a result of the growing concern of false confessions, research has been done showing that certain individuals and individuals in certain situations may be especially vulnerable to making false statements.⁴⁸ The young, the intellectually disabled, the sleep deprived and those in withdrawal are among the people at risk. If reliability is going to become an underlying reason for excluding confessions in certain situations, then judges should be made aware of the social science evidence that casts doubt on the value of some confessions, so that they can better use their discretion to exclude unreliable statements.

3. Deterrence - Preventing Abusive Interrogation Practices

Sometimes, confessions which were obtained by oppression are excluded even when there is great certainty that they are true. In these cases, commentators have cited the underlying rationale as deterring abusive police interrogation practices when such

⁴⁴ The language contained in the Fifth Amendment was extended by the *Bram* decision to include informal police interrogation. If the police coerced a suspect to give a confession against his will and if the state uses the confession against him at trial, the state has, for all practical purposes, coerced the suspect to testify against himself at trial. Godsey, *supra* note 9.

⁴⁵ *Rogers v Richmond* 365 US 534, 540-41 (1961).

⁴⁶ Joseph Thai “*Constitutionally Excluded Confessions: Applying America’s Lessons to a Democratic Iraq*” (2005) 58 *Oklahoma Law Review* 37 at 41.

⁴⁷ Sherrin, *supra* note 7.

⁴⁸ *ibid.*

confessions are excluded by the courts.⁴⁹ Such a practice reflects an intention to enforce minimum standards on police behavior since the goal of police misconduct is often to obtain a confession.

Controlling the conduct of police was recently described by the British House of Lords as part of the rationale for excluding improperly obtained confessions. The Lords held that recent English case law:

“... [E]stablished that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilized society to proper behavior by the police towards those in their custody”.⁵⁰

Others have written about the normative concern with the methods of interrogation and how such methods could be “revolting to the sense of justice”.⁵¹ This is based on the premise that the police must obey the law while enforcing the law. As the American case *Spano v New York* held: “that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves”.⁵²

In Canada, the Supreme Court of Canada has acknowledged a number of reasons underlying the confessions rule:

“What should be repressed vigorously is conduct on [the authorities’] part that ‘shocks the community’. And that while the doctrines of oppression and inducement were primarily concerned with reliability, the confessions rule also extended to protect a broader concept of voluntariness that focused on the protection of the accused’s rights and fairness in the criminal process”.⁵³

The rationale for this requirement according to the Supreme Court of Canada is to control coercive state conduct. This is a higher threshold of improper conduct by the police than the early American case of *Miranda* in which the Court held that interrogations were inherently coercive. The Court clearly expected that *Miranda* warnings would significantly reduce the potential for brutality and oppression in the interrogation room.⁵⁴ However, if the courts are primarily concerned about regulating interrogation practices that may affect reliability or deterring police misconduct, they should not be looking for vulnerabilities that appear from factors unrelated to police actions.⁵⁵

4. Protecting the Right of Suspects to Make Autonomous Decisions

Individuals are by nature free and autonomous actors, actors with a natural instinct for self-preservation. It is when this natural instinct is overborne by the authorities that the person’s autonomy is violated.⁵⁶ What does it mean to say someone’s will is overborne? The question is whether any police questioning would be overbearing on an individual resulting in excluding such confessions. It is a very subjective test. Some have argued

⁴⁹ Pattenden, *supra* note 1.

⁵⁰ Referring to the 1991 case of *Lam Chi-ming v The Queen*, as cited in the recent House of Lord’s Opinion on Torture, *supra* note 36.

⁵¹ Thai, *supra* note 46 at 41.

⁵² *Spano v New York*, 360 US 315, 320 (1959).

⁵³ Quote from Lamer J in *R v Oickle* [2000] 2 S.C.R. 3.

⁵⁴ Penney, *supra* note 6 at 379.

⁵⁵ Sherrin, *supra* note 7.

⁵⁶ Interpretation of the *Bram* decision by Penney, *supra* note 6.

that no confession obtained during custodial interrogation is truly voluntary. Some argue that the threshold of “overbearing the will” standard should be raised to permit the usual psychological forms of police questioning. As Penney argues: “This is why conservative justices and commentators have tended to substitute reliability as a proxy for voluntariness.”⁵⁷ If defence counsel were mandated to be present in the interrogation rooms, this would address the concerns of the individual’s will being overborne.

Penney talks about the self-determination theory which places independent value on the suspect’s freedom to choose whether to reveal incriminating information to the State. This theory:

“...[C]laims that the government should be prohibited from using such information in criminal prosecutions if it has been obtained through the application of pressure or inducement, even if the information obtained is reliable and the means of the pressure was not objectionable.”⁵⁸

While this theory is an old one dating back to medieval times, it has never been widely accepted in practice. Critics of this theory claim that the reality is that the State always puts pressure on criminal suspects to confess and the courts will not reverse that through its jurisprudence.⁵⁹

IV. Situation in Canada

1. The Common Law Through to the Charter

The leading English case on voluntariness, *Ibrahim v R*, was endorsed by the Supreme Court of Canada *Proske v the King* in 1922.⁶⁰ This case held that the prosecution bears the evidentiary burden and must establish voluntariness before a confession is admissible. The traditional exclusionary rule has three components:

- (1) There must be fear of prejudice or hope of advantage;
- (2) The fear of prejudice or hope of advantage must have been held out by a person in authority; and
- (3) The statement must be a result of inducement.⁶¹

The issue of whether the statement was made voluntarily is determined by the judge and is established in a *voir dire*. Information given involuntarily is excluded as evidence at trial. The voluntariness requirement is to ensure that unreliable or unfairly obtained confessions are excluded.⁶² The court has also said that the rationale for this requirement is to control coercive state conduct.

More recent case law expanded the Canadian courts concept of “voluntariness”. First of all, a statement is not considered to be voluntary if, without inducements, it is not the product of an “operating mind”.⁶³ Operating mind means being aware of consequences

⁵⁷ Penney, *supra* note 6 at 380.

⁵⁸ Penney, *ibid.*

⁵⁹ *ibid.*

⁶⁰ *Proske v The King* (1922) 63 S.C.R. 226.

⁶¹ Danny Ciraco “Reverse Engineering” (2001) 11 Windsor Review of Legal and Social Issues 41 at 43.

⁶² These objectives were deemed to be proper in *Clarkson v R* [1986] 1 S.C.R. 383 as cited in Sheppard, *supra* note 2 at 662.

⁶³ Ciraco, *supra* note 61 at 44.

and is meant to catch statements that will be untrustworthy because of the accused's lack of rationality.⁶⁴ For example, *Ward v The Queen* held that someone who was in shock from a car accident may not have an operating mind and in *Horvath v The Queen* someone who has been hypnotized may not have an operating mind.⁶⁵

Another development has been that a statement is not considered voluntary if the suspect was unaware of the consequences of making the statement and was able to make a free and informed decision to confess.⁶⁶ For example, if the accused lacks awareness caused by intoxication or mental disorder, the statement may not be considered voluntary. This shifts the emphasis to the mind of the accused rather than on an objective look at the conduct of the police. As Sheppard notes, the case law has not established exactly what the trial judge should look for when focusing on the mind of the accused and whether the accused's freedom of choice was curtailed.⁶⁷

Since there is no case law that provides that oppression is a distinct basis for the exclusion of statements, courts have held that statements given in oppressive circumstances are made involuntarily.⁶⁸ Courts have considered oppressive situations where the suspect's clothing was taken from him and several hours later he was interviewed wearing only a blanket or excessive, intrusive, prolonged interrogation.⁶⁹

The Canadian *Charter of Rights and Freedoms* supplement the common law voluntariness rules. It is through the various *Charter* rights that police interrogations are monitored, such as the right to counsel, the privilege against self-incrimination and the right to silence. When the *Charter* was enacted in 1982, some argued that there appeared to a contradiction between the common law rules of voluntariness and the *Charter* protected right to silence and right to counsel.⁷⁰ However, recent case law "suggests that both sets of rules work concurrently with respect to evidence obtained by police from the accused".⁷¹ A *Charter* challenge will arise only if the prosecutor attempts to use this evidence at trial. The prosecutor will have to prove beyond a reasonable doubt that the information obtained by the police was given voluntarily.

There is a difference between the common law rule and the *Charter* in terms of onus of proof. Under the common law rule, the burden was on the prosecution to prove beyond a reasonable doubt that the information received was obtained voluntarily, without coercion or deceit. Later case law modified the burden of proof in that the prosecution would not be made to prove the voluntariness of the confession unless the defence produced some evidence that there is a valid issue for consideration and that when the accused confessed he or she believed that it was to a person in authority.⁷² Now under the *Charter*, it is the accused that must prove, on a balance of probabilities, that there has

⁶⁴ Sheppard, *supra* note 2 at 662 and *Clarkson v R*, *supra* note 62 at 390-91.

⁶⁵ *Ward v The Queen* [1979] 2 S.C.R. 30 and *Horvath v The Queen* [1979] 2 S.C.R. 376.

⁶⁶ Ciraco, *supra* note 61 at 44.

⁶⁷ Sheppard, *supra* note 2 at 662.

⁶⁸ Ciraco, *supra* note 61 at 44.

⁶⁹ *R v Sherack* [1974] 2 W.W.R. 377 (BCSC) and *R v Precourt* (1976) 18 O.R. (2d) 714 respectively.

⁷⁰ Ciraco, *supra* note 61 at 47.

⁷¹ *ibid* at 47.

⁷² Person in authority is someone engaged in the arrest, detention, examination or prosecution of the accused as defined by *R v A.B.* (1986) 50 C.R. (3d) 247 at 256; leave to appeal to SCC refused 50 C.R. (3d) xxv [Ont].

been an infringement of his or her *Charter* rights and then to show that the impugned evidence was obtained in a manner that violated those *Charter* rights. It must be remembered that the confession rule only deals with admissibility. An accused who does not succeed in excluding a statement can still argue that the statement should be given no weight due to its unreliability.

A recent case discussed the relationship between the common law confessions rule and the *Charter*, finding that the common law rule has a broader scope than the *Charter's* provisions protecting the accused's right to silence:

“The Charter is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the Charter. The common law confessions rule is one such doctrine and it would be a mistake to confuse it with the protections given by the Charter.⁷³”

The Court effectively conceded that the confessions rule was not required by the *Charter*, it is a rule that protects the right to silence and therefore protects *Charter* values, but it is a rule that Parliament could abrogate by statute.

2. Debate Regarding “Person in Authority”

One of the requirements for a confession to be admissible is that the statement must be made to a “person in authority”. The case law reflects the debate as to what constitutes a “person in authority”. Earlier cases relied on an objective test. This objective test focused on the actual position of the person in authority, whether they were engaged in the arrest, detention, examination or prosecution of the accused.⁷⁴ However this later evolved into a subjective test of what the accused believed. The court used a subjective test in *Rothman v The Queen* where the accused was tricked into making an inculpatory statement by an officer posing as a fellow inmate.⁷⁵ The Court held that the accused did not know he was making a statement to a person in authority since the statement was given to an undercover police officer and therefore the statement was admissible. The Court inquires into the accused's state of mind. However, in a later case, *R v Hebert*, where there was an active solicitation of an accused by the undercover agent despite the accused indicating a desire to remain silent, the statement was excluded.⁷⁶

In a recent case, the accused had confessed to undercover police officers posing as criminals who had represented to him that they knew corrupt police officers who could deflect a police murder investigation away from him.⁷⁷ The Supreme Court said the test of a ‘person in authority’ had a subjective and an objective component.

The accused must have believed two things: one that the person to whom he confessed was an agent of the state capable of influencing the investigation or prosecution and two that it would be beneficial for him to confess or prejudicial for him not to do so. Belief must be reasonable.⁷⁸

⁷³ *R v Oickle* (2000)(SCC) as quoted by Justice Iacobucci.

⁷⁴ Sheppard, *supra* note 2 at 663.

⁷⁵ *Rothman v The Queen* [1981] 1 S.C.R. 640.

⁷⁶ *R v Hebert* [1990] 2 S.C.R. 151.

⁷⁷ *Grandinetti v R* [2005] 1 S.C.R. 27.

⁷⁸ As summarized in Rosemary Pattenden “Noticeboard” (July 2005) *International Journal of Evidence and Proof*.

From the accused's perspective, undercover officers are not usually persons in authority. In this case the appellant believed that the undercover officers could influence the murder investigation, but he did not believe that they were acting for the state. The defence had therefore not discharged its evidentiary burden of showing that the confession was made to a 'person in authority'. Confessions made in coercive circumstances but not to 'a person in authority' can be filtered through other exclusionary doctrines such as abuse of process.

The Canadian confession rule regarding statements made to third parties was examined by the Supreme Court of Canada in its decision of *R v Hodgson*.⁷⁹ The Court ruled that a confession made by a man with a knife held to his throat was voluntary and therefore admissible into evidence, as long as the person holding the knife could not be perceived as being part of the prosecution, as being a "person in authority". The Court concedes that: "the unfairness of admitting statements coerced by private individuals should be recognised".⁸⁰ However the Court concluded that it lacks the authority to expand the confessions rule to correct this, thereby leaving the matter to Parliament. The Court suggested that it would be too difficult for the prosecution to prove beyond a reasonable doubt the voluntariness of statements made to private citizens, because, as in the case of wiretaps, the identity of the of the recipient might not be known and therefore could not be called as a witness to prove that he did not coerce the statement.⁸¹

The Court equates undercover police officers with private citizens. Writers have criticized this as not even engaging with or acknowledging the unfairness of admitting statements coerced by undercover officers.⁸² The conclusion that only a person who has visible power over the proceedings against an accused has the power to coerce a confession is flawed. This view seems to lack the foresight to acknowledge the scenario involving private citizens holding knives to throats or police officers posing as criminals advising suspects to confess or risk the fate of other would be informants.

3. Exculpatory Statements

Regarding the issue of whether exculpatory statements were covered by the confessions rule, it really was unclear what the law was in this area prior to 1970. Some earlier cases had held that the confession rule did not apply to statements of the accused that were exculpatory. The Supreme Court of Canada's decision in *R v Piche* in 1970 cleared up the confusion and held that all statements to the police relied upon by the prosecution must comply with the confession rule.⁸³ That Court held that: "the admission in evidence of all

⁷⁹ *R v Hodgson* (1998) 127 C.C.C. (3d) 449 (SCC).

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Watts alludes to this, *supra* note 3.

⁸³ The facts of *R v Piche* were cited in Pattenden "In that case, the accused was tried for the murder of her common-law partner. At trial she gave evidence that she had taken one of her partner's rifles from a weapon rack in the bathroom intending to kill herself and had accidentally shot him as she went to give him a farewell kiss. In a state of shock she had put the rifle back and had gone with her child to her mother's for the night. The jury acquitted her. The crown appealed. The verdict was attributed by the crown to the exclusion by the trial judge of a lengthy written statement that the accused had made to the police on the day after the shooting in which she had given a totally different account of events. In that statement she had said that when, after an argument, she had left her mother's house, the deceased had been asleep on a couch. The crown says that the accused's defence of accident as submitted at the trial was an afterthought, since if the death had really been an accident the accused would have had no reason not to say so in her first statement to the police. Cross-examination on that point might have impaired the credibility of the accused's version of the events as

statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule”.⁸⁴

The Court did not classify the statements as either inculpatory or exculpatory. Some could argue that this case involved a mixed statement which included significant admissions. As one judge explained:

“It appears to me to involve a strange method of reasoning to say that an involuntary statement harmful to the accused’s defence shall be excluded because of its being untrue but that a harmful involuntary statement, of which there is not merely a danger of it being false but which the prosecution asserts to be false, should be admitted merely because, considered in isolation, it is on its face exculpatory”.⁸⁵

That the voluntariness rule applies to a wholly exculpatory statement is clear from *R v John*.⁸⁶ It is the fact that the accused made a false exculpatory assertion that incriminates.

V. Situation in England

1. The Common Law Through to the Police and Criminal Evidence Act

In England, the common law provided that anything incriminating said by the accused to a person in authority was not admissible unless the prosecution could show that it was voluntarily made.⁸⁷ The common law has insisted on an exclusionary rule rather than allowing oppression or inducement to go to the weight of the evidence.⁸⁸ The House of Lords has described the voluntariness test of the confessions law as perhaps the most fundamental rule of the English criminal law.⁸⁹

The confessions rule is now regulated by section 76(2) of the *Police and Criminal Evidence Act, 1984 (PACE)* which reads:

76(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused, it is represented to the court that the confession was or may have been obtained

(a) by oppression of the person who made it; or

(b) in consequences of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequences thereof,

The court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

related at the trial. The trial judge decided that motive and opportunity were disclosed in the statement which was therefore inculpatory and because it had been induced by persons in authority he excluded it as involuntary. The Manitoba Court of Appeal said that when made the statement was wholly exculpatory and that this obviated the need to hold a voir dire inquiry into the voluntariness of the statement.”

⁸⁴ Cartwright CJC in *R v Piche*, (1970) 4 CCC 27 at 29.

⁸⁵ Cartwright CJC in *R v Piche*, (1970) 4 CCC 27 at 29.

⁸⁶ *R v John* (1970) 2 CCC (2d) 157 at 168.

⁸⁷ *Ibrahim v R* [1914] AC 599 at 609.

⁸⁸ House of Lord’s Opinion on Torture, *supra* note 36.

⁸⁹ As cited by Lord Bingham in the House of Lord’s Opinion on Torture, *supra* note 36 and endorsed in *R v Mustaq* [2005] UKHL 25, [2005] 1 WLR 1513.

Section 82(1) of *PACE* defines confession as including “any statement wholly or partly adverse to the person who made it”. Therefore there are two distinct rationales to exclude confessions: oppressive methods of the police and reliability. Oppression arises when the police engage in conduct which so affects the mind of the defendant ‘that his will crumbles and he speaks when otherwise he would have stayed silent’.⁹⁰

2. Direction to the Jury

In criminal trials where there is a judge and jury, it is well established that the judge decides whether a confession that is alleged to have been obtained by oppression should be put to the jury. The judge decides this at a *voir dire* hearing from which the jury is excluded to prevent prejudice to the defence should the confession be held inadmissible. If the judge admits the confession, the defence can persist with the allegations of oppression or improperly obtained and this can be taken into account when weighing the evidence.

In the recent case of *R v Mushtaq*, the majority of the House of Lords had found that the defence had not discharged the evidential burden which the defence must meet before the prosecution is called upon to defend the admissibility of a confession.⁹¹ The trial judge’s charge to the jury was “it is for you to assess what weight should be given to the confession. If you are not sure for whatever reason that the confession is true, you must disregard it. If on the other hand, you are sure that it is true, you may rely on it even if it was or may have been made as a result of oppression or other improper circumstances.”⁹²

The majority of the Court held that the judge must direct jurors that if they decide that the confession was, or might have been obtained by oppression or improper means, despite what the judge might think, the jury must disregard the confession even if they believe the confession to be true. The Court looked at the reasons for the confession rule such as no one should be compelled to incriminate himself, potential unreliability and control of improper police conduct. Not only the judge, but also the jury must avoid acting incompatibly with the right to fair trial and the right against self-incrimination.⁹³

3. The Muddled Law on Exculpatory Statements

Under current English law, exculpatory statements relied upon by the prosecution appear to be treated differently from confessions and inculpatory admissions.⁹⁴ This appears to mean that exculpatory statements need not comply with the confession rule under section 76(2) of *PACE*. However as Pattenden has argued, such exculpatory statements that are relied upon by the prosecution during the criminal trial can be equally damaging to the defence.⁹⁵ She points out that prior to *PACE*, the common law required that any statement of the accused used by the prosecutor had to be voluntary. This was inferred from the

⁹⁰ *R v Pagar* [1972] 1 WLR 260.

⁹¹ *R v Mustaq* [2005] UKHL 25, [2005] 1 WLR 1513 as cited in Pattenden, *supra* note 1.

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ A mixed statements which includes both exculpatory and inculpatory statements are treated like confessions.

⁹⁵ Pattenden, *supra* note 1.

early case law, such as *Ibrahim v R* as well as the 1964 Judge's Rules.⁹⁶ Therefore, it appears that section 76 breaks with the common law on this point.

It has been argued that if the courts allowed for a broad definition of "confession" under section 82(1) to cover all statements of the accused that the prosecutor intends to offer at trial to inculcate the accused, then section 76 would ensure that exculpatory statements would be covered by the confessions rule.⁹⁷ However the majority of cases in England support a narrow reading of "confessions" in section 82(1) holding that this section did not apply to statements intended to be exculpatory.⁹⁸ The recent decision of *R v Hasan*, held that a statement is a confession within the meaning of the section 76 PACE only if it was wholly or partly adverse to its maker when it was made.⁹⁹ The use of 'includes' in section 82(1), their Lordships said: "is intended to extend the core meaning of a confession to a partly adverse statement but not to an innocent one".¹⁰⁰ A purely exculpatory statement that is offered by the prosecutor as evidence against the accused does not become a confession.

This has basically left section 78 of PACE as the only alternative to try to exclude exculpatory statements. Section 78(1) reads:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears that the court that, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

R v Hasan affirms that if an exculpatory statement was obtained by oppression, the statement is liable to exclusion under section 78.¹⁰¹ This decision means that instead of the prosecution having to prove beyond a reasonable doubt that the statement was not obtained by oppression, it is the accused who has the burden to show oppression. If, as according to the recent case of *Mushtaq*, the rationale for the confession rule is the need to restrain the coercive power of the state and to guard against unreliable statements and compelled self-incrimination, the fact that the statement appears to be exculpatory does not mean that the police did not behave oppressively.¹⁰²

According to Pattenden, section 78 offers the accused less protection than section 76(2):

"The criterion for judging whether to exclude evidence is whether "its quality was or might have been affected by the way in which it was obtained". If, in the judge's opinion, police misconduct has had a potential impact on the quality of the evidence, then the evidence must be excluded. If it has not, it must not be excluded. When dealing with a confession under section 76(2) the court does not ask whether the use of oppression has affected the quality of the confession. The result is that police misconduct of the kind that

⁹⁶ *ibid*, for example, in *R v Wattam*, the Court of Criminal Appeal assumed that an exculpatory statement that contained lies had to comply with the requirements of the Judge's Rules and be voluntary.

⁹⁷ Pattenden, *supra* note 1.

⁹⁸ *R v Ismail* [1990] Crim LR 109 as cited in Pattenden, *supra* note 1, is the only one appellate decision that goes any way towards supporting such a broad construction of section 82(1) and 76. In *R v Ismail*, evidence of an interview at which the offence was denied was excluded pursuant to section 76(2) on the grounds of oppression.

⁹⁹ *R v Hasan* [2005] UKHL 22 as discussed in Pattenden on the Noticeboard, *supra* note 78.

¹⁰⁰ *Hasan* decision as summarized in Pattenden, *supra* note 1.

¹⁰¹ *R v Hasan* [2005] UKHL 22.

¹⁰² Pattenden, *supra* note 1.

would render a confession automatically inadmissible under section 76 will not necessarily result in the exclusion of evidence under section 78.”¹⁰³ She argues that for the reasons of reliability, as well as monitoring misconduct and the privilege against self-incrimination, exculpatory statements should also have to be voluntary.¹⁰⁴

The European Court on Human Rights in *Saunders v UK* accepted that even steadfast denials of guilt in answer to incriminating questions can be highly incriminating and very damaging to a defendant.¹⁰⁵ The Court held that there is an absolute privilege against self-incrimination implicit in the notion of the right to a fair trial guaranteed by article 6 *European Convention on Human Rights*.

“The right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility.”¹⁰⁶

Basically the focus is shifted to how the evidence will be used at trial and whether such evidence is made under compulsion. As one of the judges wrote: “the privileged avoidance of self-incrimination extends further than answers which themselves will support a conviction. They must logically embrace all answers which would furnish a link in the chain of evidence needed to prosecute to conviction”.¹⁰⁷

VI. Situation in the United States

1. Confession Rule – Leading up to the Miranda Decision

As previously mentioned in the history section, the voluntariness rule was first introduced in the United States in 1897 by the *Bram* case. The definition of “voluntariness” is much more police-friendly today than it was back in 1897.¹⁰⁸ The modern involuntary confession rule looks at the totality of the circumstances in determining whether the suspect’s will was overborne, unlike *Bram* where a confession would be inadmissible if “extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight”.¹⁰⁹

For a number of complex reasons, this voluntariness test evolved into one rooted in the due process clause of the Fourteenth Amendment of the U.S. Constitution in the 1930s,

¹⁰³ Pattenden, *supra* note 1.

¹⁰⁴ Pattenden, *supra* note 1.

¹⁰⁵ *Saunders v UK* (1997) 2 BHRC 358.

¹⁰⁶ *ibid.*

¹⁰⁷ Judge Walsh, cited in Pattenden, *supra* note 1.

¹⁰⁸ Godsey, *supra* note 9 at 477.

¹⁰⁹ *ibid* at 477.

appropriately called the “due process involuntary confession rule”.¹¹⁰ As the Court described:

“The ultimate test remains... the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker. If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process”.¹¹¹

The due process involuntary confession test requires the court to assess the totality of all the surrounding circumstances. This has included both the characteristics of the accused, such as age, education, intelligence, and the details of the interrogation, such as whether the accused was informed of his or her rights, length of detention or interrogation, whether force was used or other ill-treatment. The due process test focused primarily on the suspect’s state of mind.

The due process involuntariness rule proved to be difficult to apply, and by mid-1960s the Court was looking at a substitute doctrine. The *Miranda* decision was quite a departure from the past case law.¹¹² The Supreme Court focused not on the due process and voluntary confession rule but rather on the self-incrimination clause and compelled statements. The *Miranda* case held that the mere act of custodial interrogation constitutes compulsion, being interpreted very broadly, and is an inherently coercive atmosphere.¹¹³ To address the inherent coercive atmosphere, the Court established the *Miranda* warning which allowed police to permissibly interrogate suspects in custody. The police must inform the suspect of the right to remain silent, the warning that anything said can and will be used against the individual in court, the right to have counsel present before interrogation and at the interrogation, and the right to have counsel appointed if the person is indigent.¹¹⁴ As Godsey summarized, the Court was of the opinion that such warnings would dispel the inherent atmosphere and ensure that the suspect would no longer feel pressure and be compelled to confess.¹¹⁵ Stated another way, any statement taken without the suspect knowing of his or rights would be tainted from an objective point of view and therefore is inadmissible.

Some see the *Miranda* case as returning the focus of confession law back from the due process clause to its rightful home in the self-incrimination clause, replacing the involuntary confession rule with a new objective test for compulsion under self-incrimination clause.¹¹⁶ However decisions after *Miranda* illustrate that the voluntariness test was allowed to creep back into confession law. This resulted in confusion as to which of the underlying rationales for the confession rule they were relying on.¹¹⁷

¹¹⁰ *Brown v Mississippi* was the first case which introduced the due process involuntary confessions rule in the United States, because as a result of the concern of federal jurisdictional issues for the Supreme Court, the Court was required to rely on the 14th amendment in order for them to thus supervise the States trials. Godsey, *supra* note 9 at 488.

¹¹¹ As stated in *Schneckloth v Bustamonet*, cited in Godsey, *supra* note 9 at 489.

¹¹² *Miranda v State of Arizona* 384 US 436.

¹¹³ Peter Mirfield “Case Note: *Miranda* Exclusionary Rule Re-Affirmed: *US v Dickerson*” (2001) 5 International Journal of Evidence and Proof 61.

¹¹⁴ *Miranda v State of Arizona* 384 US 436.

¹¹⁵ Godsey, *supra* note 9 at 501-502.

¹¹⁶ Godsey, *supra* note 9.

¹¹⁷ For example in *Lego v Twomey* 404 US 477 (1972). the court held that before a jury can hear a confession, the judge must make a determination that the confession was voluntarily given by a preponderance of the evidence. In another case, *Spano v New York* 360 US 315 (1959), the court must consider the totality of the circumstances regarding whether the defendant’s will was actually overborne considering “both the characteristics of the accused and the details of the interrogation”. Another way of putting it is that

2. Exceptions to Miranda

Perhaps because compulsion was defined so broadly in *Miranda*, the courts seemed to begin quite soon turning back to the other tests for the confession rule. The trend of returning to the due process involuntary confession rule is most evident in the line of cases that has come to be known as the *Miranda*-exception cases, which contrary to *Miranda*, established that custodial interrogation, by itself, does not amount to compulsion in violation of the self-incrimination clause.¹¹⁸

The first significant limitation on *Miranda* was established in the case of *Harris v New York* in 1971. The court there held that “*Miranda*’s exclusionary rule is limited to use of the un-Mirandized statements by the prosecution in its case in chief, and that prosecutors are not prohibited from using otherwise voluntary but un-Mirandized statements to impeach defendants who choose to testify”.¹¹⁹ The rationale underlying this thinking is that accused persons have the right not to testify, but if they elect to testify they have no right to perjure themselves. As long as their statements to the police are voluntary, it will not matter if they were not provided their *Miranda* warning, the statements can be used to impeach them just like any traditionally voluntary prior statement can be used to impeach any witness on cross-examination. Since this case, it has become settled law that evidence which may not be adduced as part of the prosecution case may be used in cross-examination of an accused who testifies inconsistently with some element of his confession or in rebuttal of that testimony, though as going only to credibility.

In 1974, the Supreme Court in *Michigan v Tucker* held that the “fruit” of an un-Mirandized statement was admissible as evidence.¹²⁰ This means that the ordinary “fruit of the poisonous tree” doctrine which excludes derivative evidence acquired indirectly through a breach of a constitutional right does not apply to breaches of the *Miranda* warnings. There are no equivalent exceptions to the involuntary confessions rule.¹²¹ In *Michigan v Tucker*, the accused’s state conviction was obtained with evidence from a witness whose identity police discovered during an un-Mirandized but otherwise voluntary interrogation of the defendant. The Court characterized the un-Mirandized interrogation only as “a departure from the “prophylactic standards” set down in *Miranda* and not as a violation of the defendant’s core privilege against self-incrimination”.¹²²

In 1985, the Supreme Court in *Oregon v Elstad* accepted as evidence a second Mirandized statement which was the fruit of the first un-Mirandized statement.¹²³ The Court qualified this by saying that the second statement could be admitted as long as it was voluntary. The court specifically held that the mere fact that the police failed to

“coerced confessions offend the community’s sense of fair play and decency” as stated by Mary Ellen O’Connell “*Affirming the Ban on Coercive Interrogation*” (2005) 66 Ohio State Law Journal 1.

¹¹⁸ Godsey, *supra* note 9.

¹¹⁹ *Harris v New York* cited in William T. Pizzi and Morris B. Hoffman “*Take Miranda’s Pulse*” (2005) 58 Vand. L. Rev. 813 at 819.

¹²⁰ *Michigan v Tucker* cited in Pizzi, *supra* note 119 at 820.

¹²¹ Mirfield, *supra* note 113.

¹²² Pizzi, *supra* note 119 at 820-821.

¹²³ *Oregon v Elstad*, cited in Pizzi, *supra* note 119 at 821.

include in the *Miranda* warnings given prior to the second statement advice that the first statement was inadmissible did not itself render the second statement involuntary.¹²⁴

In 1984, *New York v Quarles* was the case where the Supreme Court created the public safety exception to the *Miranda* warning requirements.¹²⁵ This exception applies when police officers have a pressing interest in interrogating a suspect to divert a potentially imminent danger to the public or themselves. In that case, police had information that an armed rapist was in a grocery store. When they arrested him in the back of the store he had no gun on him. Without giving him any *Miranda* warnings, the police asked him where the gun was and he pointed towards it and the police found a loaded gun. Both the statement and the gun were admitted in court, as a matter of public safety.

One recent case dealing with exceptions to *Miranda* includes the case of *Missouri v Seibert* where the Court looked at the situation where the police intentionally fail to Mirandized a suspect with the specific purpose of getting him to confess, then Mirandized him to get the earlier confession in writing.¹²⁶ The Court refused to apply *Elstad* in such circumstances and thus created a kind of bad faith exception the *Elstad* decision.

In the recent case of *United States v Patane*, the Court again addressed the fruits issue. The Court held that tangible fruits are no different than any other kind of *Miranda* fruit and that the Tucker-Elstad rule applies to admit such fruits despite the failure to Mirandized. Pizzi summarizes the Court's reasoning:

The *Miranda* may itself be a rule of constitutional import but the majority held that "the closest possible fit must be maintained between the self-incrimination clause and any rule designed to protect it". It concluded that because the 5th amendment traditionally has not applied to non-testimonial evidence, there was no reason to create a prophylactic extension of *Miranda* to exclude non-testimonial evidence obtained pursuant to an otherwise voluntary statement.¹²⁷

It appears that in cases where the *Miranda* warning has not been given the Court will first see whether the statement is likely to be unreliable and then whether the police misconduct is to such an extent that there is a substantive due process violation. If the answer is no despite no *Miranda* warnings, it appears that in these cases it is likely that the evidence will be admitted.

3. Restatement in Dickerson

In 2000, the case of *Dickerson* was to provide the United States Supreme Court an opportunity to clarify the confessions law in the United States and clarify the confusion resulting from the post-*Miranda* case law.¹²⁸ *Dickerson* was suspected of armed robbery and while being questioned by the police confessed to that and other similar offences. At a preliminary hearing, the District Court had ruled that all of those confessions had been made before he had been informed of his *Miranda* rights. The issue for the Supreme

¹²⁴ Pizzi, *supra* note 119 and Mirfield, *supra* note 113.

¹²⁵ *New York v Quarle* cited in Pizzi, *supra* note 119 at 822.

¹²⁶ *Missouri v Seibert* cited in Pizzi, *supra* note 119 at 830-831.

¹²⁷ Pizzi, *supra* note 119 at 831.

¹²⁸ *Dickerson v United States* 530 US 428 (2000).

Court was whether *Miranda* had been overturned in federal cases by Congressional legislation namely 18 USC §3501, which provided that a confession shall be admissible in evidence if it is voluntarily given and that a “totality of the circumstances” test is to determine a confession’s admissibility.¹²⁹ The Court was to answer the question of whether *Miranda* announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.

The Supreme Court held in *Dickerson* that the warning components of the *Miranda* decision was in fact intended to be a constitutional ruling. The Court acknowledged that their subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.¹³⁰ The Chief Justice described *Miranda* warnings as having become “part of our national culture” and concluded that traditional “voluntariness” under the Due Process Clause is an ineffective substitute because it is more difficult for police to “conform to... and for courts to apply in a consistent manner”.¹³¹

4. Criticisms of the Confessions Rule in the United States

Godsey goes to the beginning of the confusion and says that:

The involuntary rule exists today in the United States because of a series of mistakes and doctrinal complications beginning with *Bram v US* and continuing even after *Miranda* seemingly rendered the rule obsolete.¹³²

Miranda relies on the self-incrimination clause which suggests a standard based on “compulsion” (invoking an objective test of the behaviour of the interrogators), rather than on “voluntariness” (invoking a subjective test of the suspect’s mind). He argues that the proper test for admissibility under the self-incrimination clause should be compulsion rather than voluntariness.¹³³

Penney reviews some of the criticisms of the *Miranda* decision, such as if custodial interrogations are inherently coercive how can a recitation of rights by police make it less so.¹³⁴ He says some commentators recommend abandoning *Miranda* and determine the admissibility of confessions pursuant to some kind of case-by case voluntariness inquiry. Others argue that the court correctly identified the coercive nature of police interrogation, but failed to take measures to dissipate that coercion and vindicate the interrogated suspect’s privilege against self-incrimination. These critics advocate either an outright ban on custodial interrogation or a prohibition on the admissibility of confessions obtained before a suspect has consulted with counsel.¹³⁵ Others cite the three major flaws in *Miranda* as including:

¹²⁹ Two years after *Miranda*, Congress enacted 18 USC 3501 (1968) which was intended to overrule the *Miranda* warnings by once again making voluntariness, rather than the recitation of warnings, the touchstone for the admissibility of confessions. This provision set forth a nonexclusive list of factors that courts could consider in determining voluntariness. For more information see Thai, *supra* note 46.

¹³⁰ *Dickerson* case cited in Thai, *supra* note 46.

¹³¹ As quoted in Pizzi, *supra* note 119.

¹³² Godsey, *supra* note 9.

¹³³ *ibid.*

¹³⁴ Penney, *supra* note 6.

¹³⁵ Penney, *supra* note 6.

(1) is the majority's view of the "inherently coercive" nature of the police/citizen relationship an accurate one? (2) even if it were, does Miranda cure the disease? (3) finally, does the majority's view of the problem justify, as a constitutional matter, the Court's unprecedented extension of the self-incrimination clause?¹³⁶

The due process test was criticized by Thai for failing to distinguish between permissible and overbearing pressures in more subtle physical or psychological forms.¹³⁷ Subtle physical or psychological forms such as the use of false sympathy or fabricated evidence, implied promises of leniency or harshness have been factored into the voluntariness inquiry, but none on their own have resulted in exclusion of the confession.¹³⁸

VII. Situation in Australia

1. Confession law

In Australia, the common law rule is that a confession must be excluded unless it was voluntary.¹³⁹ This is supposedly based on a concern for reliability. However in its application, the discretion to exclude has been based on the concern with reliability, the right to silence, improper police conduct and other concerns of trial fairness. As like in other jurisdictions, this uncertainty of the underlying rationale for the voluntariness test has created some confusion in this area.

The High Court of Australia's recent decision in *R v Swaffield* and *Pavic v R* has provided some clarity in this area of law and has reintroduces reliability as one of the major tests of admissibility. The reformulated test for admissibility of confessions is:

1. Was it voluntary? If so,
2. Is it reliable? If so,
3. Should it be excluded in the exercise of discretion?

This reformulation reflects the earlier common law principle as well as the approach established under the *Evidence Act 1995* (New South Wales and Commonwealth). This then achieves a more uniform approach across all Australian jurisdictions.

These decisions discuss what is meant by voluntariness. Rather than voluntariness meaning free from pressure of any kind, it means free from undue pressure. In theory the inquiry focuses not on the circumstances which create pressure but on their effect on the suspect. Commentators have criticized how this is extremely difficult to do.¹⁴⁰ In reality, judges will be confined to examining the pressure in the circumstances, and their finding will ultimately be not that the suspect's will was overborne, but that the circumstances created too much pressure to be able to admit the confession into evidence. Then the question becomes how much or what kind of pressure is permissible, which becomes more of a focus on police conduct. As provided for in the *Evidence Act 1995*, a

¹³⁶ Pizzi, *supra* note 119.

¹³⁷ Thai, *supra* note 46.

¹³⁸ Thai, *supra* note 46.

¹³⁹ The information for this section was taken from Pattenden, *supra* note 1 and Elizabeth Stone "The Law of Confessions in Theory and Practice: *Swaffield and Pavic*" (March 1999) *International Journal of Evidence and Proof*.

¹⁴⁰ *ibid.*

confession is not admissible unless it is shown that it was not influenced by “violent, oppressive, inhuman or degrading conduct”.

This new test places greater weight on “reliability” than was previously done. As one of the judges discussed:

“Unreliable evidence not only taints individual trials. It also undermines community confidence in the administration of justice and law enforcement. If evidence is properly classified by the judge as unreliable, it should not be admitted.”

Reliability, which had in past cases been less of a focus than voluntariness and concern of the suspect’s will, has been reasserted in this reformulated exclusionary rule.

The new test also has the courts exercise a general discretion into trial fairness. This includes examining public policy issues as well as reviewing trial fairness, such as the right to silence and privilege against self-incrimination. This reflects the discretion as set out in the *Evidence Act*, which includes discretions for unfairness, public policy and unduly prejudicial evidence.

2. Statements to Undercover Police Officers and Third Parties

The accused in the case of *Swaffield* had declined to speak to the police when he was first interrogated regarding a break-in and arson charge. A few months later, the accused was a target of an undercover drugs operation and one of the undercover police officers engage him in conversation regarding the arson incident. The accused made admissions of his involvement of the fire after the undercover officer asked him for advice on how to start a fire for car insurance. The trial judge refused to exclude the evidence of the conversations with the undercover officer and the accused was convicted at trial. The accused argued that the police cannot ignore the accused’s right to silence by deceiving a suspect who had already asserted that right previously by obtaining a confession covertly.

The majority of the court held that the accused’s right to silence had been violated because the admissions were elicited by the undercover police officer. The confession about the fire was found to be prompted by the officer rather than the accused. The confession was excluded. This case leaves unclear as to why the right to choose whether to speak is not infringed by covert police operations, but is infringed when undercover police elicit the admissions from the suspect. One commentator writes that perhaps this case been interpreted narrowly since the accused in this case had already indicated his right to remain silent when speaking to the police at an earlier time.

In the other recent case, *R v Pavic*, the accused had been interviewed by police regarding a murder and declined to speak to them. Later, the police took a statement from the accused’s friend who believed that he himself was a suspect of the murder in question. The police convinced this friend to speak to the accused and secretly record the conversation. This was done and the accused confessed to involvement in the murder to his friend. The trial judge admitted the confession at trial and the accused was convicted. The High Court agreed with the trial judge that the confession could be admitted. They reasoned that in this case the confession had not been elicited. Writers have criticized this finding as the facts illustrate that the friend specifically asked direct questions about the

murder weapon and where it was disposed and also repeated statements that he feared being wrongly accused of the murder.

3. Exculpatory statements

In an early Australia High Court decision, the *Martin* case, the court interpreted the legislature of the *Crimes Act 1990 (NSW)* and the common law to be that exculpatory statements are not covered under the common law voluntariness rule.¹⁴¹ In this case, the accused was charged with wounding and he provided a statement that he was some 200 yards from the victim when the victim was wounded and he asserted that someone else committed the offence. The majority of the court concluded that the statement was purely exculpatory while one found that it contained an admission.

This case addressed the proper construction of section 401 of the *Crimes Act 1900 (NSW)*. This section provides that no “confession, admission or statement” should be admissible against an accused if it had been induced by any untrue representation, threat or promise. The accused was successful at trial in arguing that this section applied to any statement made to the police and the onus was on the prosecution to show why the statement should not be inadmissible. The High Court concluded that section 401 must be read with the common law rule which:

“Referred only to statements of an incriminating nature, and not to statements which are not of the nature of an admission of guilt, but incidental statements relating to relevant facts, and admissible on that ground. For instance, where a person was found in recent possession of stolen property, it was never necessary to prove affirmatively that the account which he gave of his possession was not induced by any untrue representation threat or promise.”¹⁴²

The issue of whether exculpatory statements are covered by the confessions rule has been dealt with in two recent cases in the state of Victoria in Australia. These cases have held that exculpatory statements that are turned against the accused by the prosecution must be voluntary.¹⁴³ These cases appear to reverse the *Martin* case.

VIII. The Laws of Confession in the Age of Terrorism

There is a concern that coercive conduct by law enforcement authorities is on the rise along with the arguments that such interrogations are necessary in this new war on terrorism. This part of the paper will look at a few examples of how the fight against terrorism has impacted on the confessions laws in these jurisdictions.

The current debate in the United States Senate and Congress about the definition and use of torture in certain interrogations reflects, to some extent, what is also happening in other jurisdictions. The American office of the Attorney General has stated that the United States military panels reviewing the detention of foreigners as enemy combatants

¹⁴¹ *Attorney-General of New South Wales v Martin* (1909) 9 CLR 713 as cited in Pattenden, *supra* note 1.

¹⁴² *Martin* case at 724, *ibid*.

¹⁴³ *R v Elliott* 6/5/96 (SC Vic) and *R v SU* (1995) 129 FLR 120 as cited in Pattenden, *supra* note 1.

are using evidence gained by torture in deciding whether to keep them imprisoned at Guantanamo Bay.¹⁴⁴ A number of commentators have responded to the use of torture and what has been described as the “torture myth”. This myth assumes that torture is only used against individuals whom the government has clearly established have strong ties to terrorism, assumes that the information possessed by those who are being tortured is important, lives will be saved or attacks diverted and that physical pressure is highly effective.¹⁴⁵ In response to such a myth, one writer persuasively argues that torture does not always produce the desired information and in the cases in which it does it may not produce it in a timely fashion. Any marginal benefit of torture is low because traditional techniques of interrogation may be as good, and possibly even better at producing valuable intelligence without torture’s tremendous costs.¹⁴⁶

This part of the paper can not give justice to the varied arguments surrounding torture and merely proposes to review some recent decisions in the United Kingdom and the United States regarding the laws of confession in terrorist cases.

1. Coerced Statements Provided by Foreign Authorities – the Recent U.K. Decision

The House of Lords in Britain recently released an opinion on December 8, 2005 wherein they addressed the issue of whether a British court can admit as evidence in court proceedings information extracted by torture administered overseas by foreign authorities.¹⁴⁷ During the first hearing by the Special Immigration Appeals Commission (SIAC) that Commission held that such evidence was legally admissible but the circumstances such as torture would be relevant to the weight of the evidence. A majority of the Court of Appeal agreed with SIAC.¹⁴⁸ All of the Lords disagreed with the lower decisions and answered this question in the negative. However, they did differ on the burden of proof issue.

This case called into question the process created by part 4 of the 2001 *Anti-Terrorism, Crime and Security Act* which established a new regime, applicable to persons who were not British citizens whose presence in the United Kingdom the Secretary of State reasonably believed to be a risk to national security and who he suspected of being a terrorist.¹⁴⁹ By section 21, the Secretary of State was authorized to issue a certificate which he then could detain such individuals under section 23. The suspects are allowed to appeal to the Special Immigration Appeals Commission (SIAC). The Secretary of State must file a statement of the evidence on which he relies but may object to this being

¹⁴⁴ The US government conceded this in a US District Court hearing on lawsuits brought by some of the 550 foreigners imprisoned at the US naval base in Cuba. The lawsuits challenge their detention without charge for up to 3 years. The government’s argument is that the detainees have no constitutional rights enforceable in American courts. There is still no ruling on whether the detainees can proceed with their lawsuit. CNN news bulletin “Government: Evidence gained by torture allowed” (December 2, 2004) <http://cnn.law.com>.

¹⁴⁵ Jeannine Bell “*One Thousands Shades of Gray: The Effectiveness of Torture*” (2005) Indiana University School of Law-Bloomington Legal Studies Research Paper Series, Research Paper Number 37.

¹⁴⁶ Bell, *ibid*.

¹⁴⁷ Opinions of the Lords of Appeal for Judgment in the Case A (F.C.) and Others v Secretary of State for the Home Department, *supra* note 36. The appellants were ten foreign nationals, all Arab Muslims suspected of links to Al Qa’eda or Osama bin Laden. They alleged that some of the evidence on which the Home Secretary supported the detentions before SIAC may have been extracted by torturing third parties at the US military bases at Guantanamo Bay, Cuba or Bagram Airbase in Afghanistan.

¹⁴⁸ [2004] EWCA Civ 1123, [2005] 1 WLR 414.

¹⁴⁹ *Anti-Terrorism, Crime and Security Act, 2001*, Chapter 24.

disclosed to the appellant or his lawyer on security grounds in which case there is a special advocate appointed for such a hearing.

This case reviews at length the issue of torture and the rule of confessions. Basically the Court held that the common law forbids the admission of evidence obtained by the infliction of torture and does so whether the confession is by a suspect or witness and irrespective of where, by whom or on whose authority the torture was inflicted.¹⁵⁰ The common law position is based on “the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice”.¹⁵¹ As Sir William Holdsworth has written: “Once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation”.¹⁵²

The Lords relied on a previous judgment, where they held that “the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the courts conscience as being contrary to the rule of law.”¹⁵³ As stated in another judgment: “every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state.”¹⁵⁴

In international instruments, there is an absolute, non-derogable prohibition against torture and inhuman or degrading treatment and this is considered one of the fundamental values of the democratic societies.¹⁵⁵ Basically an accused who is convicted on evidence obtained from him or her by torture has not had a fair trial. The international prohibition of torture requires States not merely to refrain from authorizing or conniving at torture but also to suppress and discourage the practice and not to condone it. Article 15 of the Convention Against Torture requires the exclusion of statements made as a result of torture as evidence in any proceeding. This is a blanket statement, covering any proceeding not just criminal proceedings, not just referring to confessions but any statement and not just applying to the jurisdiction where the torture was committed. The rationale of the exclusionary rule in article 15 is found not only in the general unreliability of evidence procured by torture, but also in its offensives to civilized values and its degrading effect on the administration of justice.¹⁵⁶

¹⁵⁰ A discussion of English case law supporting the common law position is cited in Lords Opinion, *supra* note 36. The Lords discuss the history of how England in the 16th and early 17th Century torture was practiced pursuant to warrants issued by the Council or the Crown usually in relation to alleged offences against the State. Parliament abolished the Court of Star Chamber where torture evidence had been received and that was the year the last torture warrant was issued in England.

¹⁵¹ Lord Bingham of Cornhill, in the Lords Opinion case, *supra* note 36.

¹⁵² Sir William Holdsworth, *A History of English Law*, 1945 as cited in the Lords Opinion case, *supra* note 36.

¹⁵³ *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 was a case where the accused had been abducted from South Africa and brought to England in gross breach of his rights and the law of South Africa, at the behest of the British authorities to stand trial in England.

¹⁵⁴ *R v Looseley, Attorney General's Reference* (no 3 of 2000) [2001] UKHL 53, [2001] 2060.

¹⁵⁵ *International Covenant on Civil and Political Rights*, article 7, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (hereinafter Convention Against Torture), and *Soering v UK* (1989) 11 EHRR 439. Also the case of *Prosecutor v Furundzija* [1998] ICTY 3, 10 Dec 1998 sets out clearly the main features of the prohibition against torture in international law. The prohibition covers potential breaches, imposes obligations erga omnes and has acquired the status of jus cogens.

¹⁵⁶ Lords Opinion case, *supra* note 36.

As Mr. Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights put it “torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter”.¹⁵⁷ The House of Lords held that measures directed to counter the grave dangers of international terrorism may not be permitted to undermine the international prohibition of torture.¹⁵⁸

It was the issue regarding the burden of proof which divided the Lords. All agreed that the conventional burden of proof where the accused must prove something before the court will look at this issue is inappropriate in this context. All the accused must do is raise the issue by asking that the point be considered by SIAC. Once the issue is raised SIAC has the onus to decide whether there are reasonable grounds to suspect that torture has been used in that case. It is here that the Lords disagreed. The Majority of the Lords held that SAIC should refuse to admit the evidence if it concludes that the evidence was obtained by torture, on a balance of probabilities. In other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it. This, they say, follows the wording in article 15 of the Convention Against Torture which says that the exclusionary rule extends to any statement that “is established” to have been made under torture. Lord Bingham disagreed with this saying that if SIAC is unable to conclude that there is not a real risk that the evidence had been obtained by torture, it should refuse to admit the evidence. Lord Bingham says this is a very difficult test which the suspect will have difficulty in establishing, especially since we are dealing with foreign torturers, the special advocates have no means or resources to investigate, the detainee is in the dark, and the security service does not wish to imperil their relations with regimes where torture is practiced.¹⁵⁹

This Opinion referred to the *El Motassadeq* case, a terrorist trial in Germany which involved summaries of statements made by three Arab men who were detained in the United States. There was material suggesting that the statements had been obtained by torture and the German court sought information on the whereabouts of the witnesses and the circumstances of their examination. The whereabouts of two of the witnesses had been kept secret for several years, but it was believed that the American authorities had access to them. The American authorities supplied no information and said they were not in a position to give any indications as to the circumstances of the examination of these persons. The German court, although noting that it was the U.S. whose agents were accused of torture and which was denying information to the court, proceeded to examine the summaries and found it possible to infer from internal evidence that torture had not been used. Lord Bingham criticized this decision saying that the summaries should have been excluded.¹⁶⁰

¹⁵⁷ Mr. Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights was quoted by Lord Bingham in Lords Opinion case, *supra* note 36.

¹⁵⁸ Lords Opinion case, *supra* note 36.

¹⁵⁹ This paragraph summarizes the various opinions on this issue from the Lords Opinion case, *supra* note 36.

¹⁶⁰ The facts and discussion of the *El Motassadeq* case a decision of the Higher Regional Court of Hamburg of 14 June 2005 was taken from Lord Bingham’s opinion at 45 of Lords Opinion case, *supra* note 36.

As Lord Bingham stated the rationale of the exclusionary rule contained in the Convention Against Torture appears to be based on two considerations:

“First of all, it is clear that a statement made under torture is often an unreliable statement, and it could therefore be contrary to the principle of fair trial to invoke such a statement as evidence before a court. Even in countries whose court procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture.”¹⁶¹

2. Investigations Conducted Abroad

In *United States v Bin Laden*, a federal district court suppressed statements made abroad during the investigation of the 1998 bombings of U.S. embassies in Kenya and Tanzania, holding that the suspects should have been given *Miranda* warnings.¹⁶² The issue in this case was whether a nonresident alien defendant’s non-Mirandized statements were admissible at trial in the United States, when the statements were the results of interrogations conducted abroad by U.S. law enforcement officials. The court concluded that the Fifth Amendment’s right against self-incrimination applies to the extent that the alien suspect is on trial in the United States. In addition, American law enforcement agents conducting investigations abroad should still use the familiar *Miranda* warnings framework “even if interrogation by US agents occurs wholly abroad... while [the defendant is] in the physical custody of foreign authorities”.¹⁶³

As Judge Sands held “a principled, but realistic application of *Miranda*’s familiar warning/waiver framework... is both necessary and appropriate under the 5th amendment”. He goes on to exclaim that:

Miranda is required because “the inherent coerciveness of [police interrogation] is clearly no less troubling when carried out beyond our borders and under the aegis of a foreign stationhouse”. A foreign stationhouse presents an even greater threat of compulsion because the American authorities lack total control over the suspect.¹⁶⁴

The Court also noted that suspects might be “unduly predisposed “to talk to US authorities in hopes of relocation to the US, where there are greater protections afforded criminal defendants”.¹⁶⁵ American law enforcement agents should therefore employ the *Miranda* warnings to safeguard the privilege against self-incrimination. The Court discussed the rationale of deterrence of American agents who are conducting investigations abroad but acknowledged that such warnings may need to be adjusted or modified in the context of foreign interrogations.¹⁶⁶ Judge Sands argues that this requirement will not impede foreign intelligence gathering as this rule will only kick in when such evidence is offered by the prosecution in a criminal trial in the United States.¹⁶⁷

¹⁶¹ Lords Opinion case, *supra* note 36.

¹⁶² Darmer, *supra* note 31.

¹⁶³ *Ibid* at 345.

¹⁶⁴ Darmer, *supra* note 31 at 346-347.

¹⁶⁵ Darmer, *supra* note 31. at 347.

¹⁶⁶ Darmer, *supra* note 31 at 347.

¹⁶⁷ *ibid.*

Godsey wrote that Judge Sand imposed upon U.S. agents conducting investigations abroad an extraordinary and unrealistic duty to discern relevant foreign law and he proposed an alternative modification to the *Miranda* warning abroad. On the other hand, Darmer agrees with the self-incrimination clause applying to aliens tried in American courts but proposes a “foreign interrogation” exception to *Miranda*, particularly where there is a technical breach of *Miranda* and that the statement was made voluntarily. There have been cases where courts have admitted into evidence statements made to foreign police that were not preceded by the warnings, so long as the statements were actually voluntary (as opposed to being “presumptively compelled” under *Miranda*).¹⁶⁸ Darmer argues that without a foreign interrogation exception,

“American agents investigating terrorism may be forced to choose between intelligence-gathering in the broad interests of preventing future attacks and evidence gathering for the purposes of bring criminals to justice.”¹⁶⁹

He says this is an untenable dilemma.

In another case in 2002, the one dealing with the “American Taliban”, John Walker Lindh, his lawyers sought to suppress statements made by their client after his capture in Afghanistan, alleging violations of both his *Miranda* and due process rights. As Darmer writes, “this case raises evolving notions of due process that must take into account risks to national security”.¹⁷⁰ His argument is that such statements that are truly compelled should never be admitted but those that are voluntary but merely involve a technical breach of the *Miranda* warnings do not violate the self-incrimination clause.

On July 15, 2002 John Walker Lindh pled guilty to supplying services to the Taliban and to carrying explosives during the commission of a felony. This meant that the court did not have to determine whether Lindh’s motion to suppress statements made to U.S. authorities who interrogated him in Afghanistan was based on Fifth Amendment privilege against self-incrimination and due process rights. Lindh argued that his statements were extracted by techniques the United States Supreme Court has unequivocally condemned “including incommunicado detention, food, sleep and sensory deprivation, denial of a timely presentation before a magistrate, denial of clothing and proper medical care, humiliation and failure to inform him of his rights”.¹⁷¹ His treatment by Northern Alliance soldiers before the American took him into their custody he alleged amounted to torture, cruel and unusual treatment. The American government argued that his statements were voluntary. Darmer argues that “notions of due process are sufficiently flexible to allow for substantial leeway in questioning terrorism suspects and conduct that might “shock the conscience” in other contexts might be tolerated in this one”.¹⁷²

¹⁶⁸ The rationale for admitting such statements into evidence in American courts, despite the lack of warnings, is that “the *Miranda* requirements were primarily designed to prevent United States police officers from relying on improper interrogation techniques” and have “little, if any, deterrent effect upon foreign police officers”. Darmer, *supra* note 31.

¹⁶⁹ Darmer, *supra* note 31.

¹⁷⁰ Darmer, *supra* note 31 at 355.

¹⁷¹ Darmer, *supra* note 31 at 356.

¹⁷² Darmer, *supra* note 31 at 372.

While there are inherent difficulties in balancing the rights of criminal suspects with the legitimate goals of law enforcement, these difficulties are magnified in cases involving terrorism and national security. Some see that confessions are critical in these cases and obtaining justice in such cases is of critical importance.

IX Conclusion

The law of confessions has been criticized for its confusing and convoluted development in most jurisdictions. Between the interests of society in controlling crime and the interests of suspects in fair treatment, the law of confessions plays a number of roles. It seeks to ensure reliability of information being put forward at trials. It plays a part in deterring or preventing police abuse in interrogating suspects of crimes. It plays a role in protecting the individual's rights to self-determination and the ability to make a free choice in whether or not to speak to the police or remain silent without being compelled to do so.

In Canada, the *Charter*-protected rights to silence, to counsel and the privilege against self-incrimination supplement the common law voluntariness rule. The Canadian courts have recognized that the voluntariness requirement is to ensure reliability, fairness in obtaining confessions and control of coercive police practices in obtaining any statement from the accused, whether inculpatory or exculpatory. The English law has codified the common law voluntariness rule into legislation which explicitly sets out two rationales for excluding confessions: oppressive methods of the police and reliability concerns. English case law differs from the Canadian law in that it appears that exculpatory statements are not covered by the law of confessions. This means that the English courts will not require the prosecutors to prove beyond a reasonable doubt that the exculpatory statements were not obtained by oppression. The Australian courts have recently reintroduced reliability as one of the major tests of admissibility of confessions, which reflects the earlier common law principle and the recent development in legislation of New South Wales. The Australian courts, similar to the Canadian courts, view that all statements of the accused that are intended to be introduced by the prosecution must be voluntary. The American courts continue to confuse the doctrinal reliance which underlines the confession rule in the United States. Despite the restatement in *Dickerson* of the *Miranda* decision that unwarned statements may not be used as evidence against the accused, the number of exceptions to the *Miranda* decision remain.

The role of the confessions law and the complexity and conflicting interests surrounding the law is clearly seen in the recent dilemma in the war on terrorism. The recent British House of Lords' opinion clearly ensures that any coerced statements of the accused will not be allowed to be admitted into evidence in British courts, irrespective of whether such statements were obtained by British or foreign authorities. However with the burden of proof on the court to conclude that the evidence was obtained by torture on a balance of probabilities, has meant that if the court is left in doubt as to how the evidence was obtained, the statement should be admitted. Given the secrecy and lack of disclosure in these cases, this may be a rather difficult test for the suspects to refute.